Nos. 80-2070 and 81-24

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

SUMITOMO SHOJI AMERICA, INC.,

Petitioner & Cross-Respondent,

—v.—

LISA M. AVIGLIANO, DIANNE CHENICEK, ROSEMARY T. CHRISTOFARI, CATHERINE CUMMINS, RAELLEN MANDELBAUM, MARIA MANNINA, SHARON MEISELS, FRANCES PACHECO, JOANNE SCHNEIDER, JANICE SILBERSTEIN, REIKO TURNER and ELIZABETH WONG,

Respondents & Cross-Petitioners.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF *AMICI CURIAE* OF THE EAST ASIATIC COMPANY, LTD., THE EAST ASIATIC COMPANY, INC., AND HEIDELBERG EASTERN, INC. IN SUPPORT OF PETITIONER SUMITOMO SHOJI AMERICA, INC.

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QUESTION PRESENTED

In the complete absence of an expression of Congressional intent, has Title VII of the Civil Rights Act of 1964, as amended, impliedly revoked the express right of Japanese corporations set forth in Article VIII(1) of the 1953 Treaty of Friendship, Commerce and Navigation between the United States and Japan to fill management-level positions in their United States branches and subsidiaries with Japanese citizens?

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STATEMENT OF INTEREST

Amici curiae herein are three corporations, one, The East Asiatic Company, Ltd., incorporated in the Kingdom of Denmark and the other two, Heidelberg Eastern, Inc. and The East Asiatic Company, Inc., incorporated pursuant to the laws of the State of New York. The East Asiatic Company, Ltd. is the

parent corporation of The East Asiatic Company, Inc., which in turn controls Heidelberg Eastern, Inc. Like Petitioner, The East Asiatic Company, Ltd. has claimed the right to select Danish citizens "of its choice" to serve as managerial personnel in its United States branches and subsidiaries pursuant to a Treaty of Friendship, Commerce and Navigation between the United States and Denmark (the "Danish Treaty"). The complete text of the Danish Treaty is attached hereto as Appendix A.

The *amici curiae* herein have an interest in this litigation due to the great similarity between the Danish Treaty and the Treaty of Friendship, Commerce and Navigation between the United States and Japan (the "Japanese Treaty" or the "Treaty") at issue in the instant litigation. The Danish Treaty, Article VII(4) provides in pertinent part that (emphasis added):

> *Nationals and companies of either Party shall be permitted to engage, within the territories of the other Party,* accountants and other technical experts, *executive personnel*, attorneys, agents and other specialized employees *of their choice, regardless of nationality.*

12 U.S.T. at 915.

Similarly, the Japanese Treaty, Article VIII(1) provides in pertinent part that (emphasis added):

> *Nationals and companies of either Party shall be permitted to engage, within the territories of the other Party,* accountants and other technical experts, *executive personnel*, attorneys, agents and other specialists *of their choice.*

4 U.S.T. at 2070.

Accordingly, any judicial or legislative action which affects the interpretation of the rights of Japanese corporations under the Japanese Treaty also will clearly affect the interests of Danish corporations under the Danish Treaty.

Moreover, Danish corporations are not the only foreign governments, nationals, and corporations with a substantial

interest in the Court's interpretation of the Japanese Treaty herein. The Danish Treaty is one of many Treaties of Friendship, Commerce and Navigation entered into between United States and other countries,[1] and these FCN Treaties, most of which contain a similar provision for staffing executive-level positions with citizens of the foreign country, affect a substantial amount of the foreign trade which the United States conducts worldwide. One report of the massive volume of this international trade states that the direct investment abroad of United States corporations totaled in excess of $192 billion in 1979, and that foreign direct investment in the United States in the same year exceeded $52 billion. Petitioner's Pet. for Cert. at 9 n. 7. Consequently, the rights of a substantial number of both United States and foreign corporations, which rights help these corporations generate the billions of dollars in international trade involving the United States, will either be significantly protected or dismantled by this Court's decision herein.

Like Petitioner, the *amici curiae* herein are defendants in an action brought by a former employee, a United States citizen, who alleges that the failure of his U.S. employer, Heidelberg Eastern, Inc., to promote him and his subsequent termination from employment violated Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000 *et seq.* ("Title VII") and were not protected by Article VII(4) of the Danish Treaty. *See Linskey v. Heidelberg Eastern, Inc.*, 470 F. Supp. 1181 (E.D.N.Y. 1979). On a motion for reconsideration made subsequent to the decision of the Second Circuit herein below and of

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1 The United States is a party to approximately thirty such Treaties of Friendship, Commerce and Navigation ("FCN Treaties") with various nations, including Italy, Ireland, Colombia, Greece, Israel, Denmark, Japan, Federal Republic of Germany, Haiti, Nicaragua, Uruguay and others. *See* Walker, *Provisions on Companies in United States Commercial Treaties*, 50 Am. J. Int'l L. 373, 373 n. 1 (1956); Walker, *Treaties for the Encouragement and Protection of Foreign Investment: Present United States Practice*, 5 Am. J. Comp. L. 229, 230 n. 3 (1956); Note, *Commercial Treaties and the American Civil Rights Laws: The Case of Japanese Employers*, 31 Stan. L. Rev. 947, 948 n. 6 (1979) (and accompanying text).

the Fifth Circuit in *Spiess v. C. Itoh & Co. (America), Inc.*, 643 F.2d 343 (5th Cir. 1981), the District Court in *Linskey* refused to reverse its position even though it found the rationale in *Spiess* "quite compelling". Petitioner's Suppl. Brief in Supp. of Pet. for Cert., App. C at 22a.

Moreover, like Petitioner, the *amici curiae* herein have similarly defended their hiring and promotion practices in the *Linskey* action by claiming protection from such claims under Title VII by virtue of valid and enforceable rights granted to them by the Danish Treaty, which allows the *amici curiae* herein, as well as all Danish corporations, the unfettered right to appoint Danish citizens "of their choice" to management positions in their U.S. branches and subsidiaries.

Because of the significance of the Treaty rights at stake herein and in the several lawsuits involving similar treaties, a decision by this Court adverse to Petitioner will have a substantial detrimental impact on the international trade carried on between the United States and many other countries throughout the world. However, as demonstrated below, a decision herein adverse to Petitioner is completely unnecessary since the Treaty neither conflicts with Title VII nor has been revoked or superseded by it.

In order to protect the great volume of international trade involving the United States, and because any decision by this Court herein will substantially resolve the issues raised by the litigation in which the *amici curiae* herein are involved, the *amici curiae* herein respectfully submit this Brief urging this Court to uphold the rights granted Petitioner by the Japanese Treaty against Respondents' challenge below.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit dated January 9, 1981 is reported at 638 F.2d 552. The opinion of the United States District Court for the Southern District of New York dated June 5, 1979 is reported at 473 F. Supp. 506. Certification for immediate appeal pursuant to 28 U.S.C. § 1292(b) was granted in an opinion of the United States District Court for the Southern District of New York dated August 9, 1979, unofficially reported at 20 Empl. Prac. Dec. (CCH) ¶ 30,205 and 20 Fair Empl. Prac. (BNA) 72. The opinion of the United States District Court for the Southern District of New York on reargument, dated November 29, 1979, is unofficially reported at 21 Empl. Prac. Dec. (CCH) ¶ 30,501 and 21 Fair Empl. Prac. (BNA) 580.

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit was entered on January 9, 1981. On November 3, 1981, this Court granted Petitioner's Request for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit. 50 U.S.L.W. 3334 (1981). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

This brief *amici curiae* is submitted pursuant to Rule 42 of the Rules of the United States Supreme Court, by the consent of all parties to this action which is on file with this Court.

TREATY, STATUTES, AND REGULATION INVOLVED

1. Article VIII(1) of the Treaty provides in relevant part (4 U.S.T. 2063, 2070):

> Nationals and companies of either Party shall be permitted to engage, within the territories of the other Party, accountants and other technical experts, executive personnel, attorneys, agents and other specialists of their choice.

2. Article VII(1) of the Treaty provides (4 U.S.T. at 2069):

> Nationals and companies of either Party shall be accorded national treatment with respect to engaging in all types of commercial, industrial, financial and other business activities within the territories of the other Party, whether directly or by agent or through the medium of any form of lawful juridical entity. Accordingly, such nationals and companies shall be permitted within such territories: (a) to establish and maintain branches, agencies, offices, factories and other establishments appropriate to the conduct of their business; (b) to organize companies under the general company laws of such other Party, and to acquire majority interests in companies of such other Party; and (c) to control and manage enterprises which they have established or acquired.

3. Section 703(a) of Title VII (42 U.S.C. § 2000e-(2)(a)) provides:

> It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment. because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

4. Section 703(e) of Title VII (42 U.S.C. at § 2000e-2(e)) provides in relevant part:

> (e) Notwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment practice

> for an employer to hire and employ employees . . . on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise. . . .

5. Section 101(a)(15)(E)(i) of the Immigration and Nationality Act of 1952, as amended, 8 U.S.C. § 1101(a)(15)(E), provides in relevant part:

> [A]n alien entitled to enter the United States under and in pursuance of the provisions of a treaty of commerce and navigation between the United States and the foreign state of which he is a national . . . (i) solely to carry on substantial trade, principally between the United States and the foreign state of which he is a national . . . .

6. 22 C.F.R. § 41.40(a)(1981) provides in relevant part:

> (a) An alien shall be classifiable as a non-immigrant treaty trader if he establishes to the satisfaction of the consular officer that he qualifies under the provisions of section 101(a)(15)(E)(i) of the Act and that: (1) He intends to depart from the United States upon the termination of his status; and (2) if he is employed by a foreign person or organization having the nationality of the treaty country which is engaged in substantial trade as contemplated by section 101(a)(15)(E)(i), he will be engaged in duties of a supervisory or executive character, or, if he is or will be employed in a minor capacity, he has the specific qualifications that will make his services essential to the efficient operation of the employer's enterprise and will not be employed solely in an unskilled manual capacity.

STATEMENT OF THE CASE

Petitioner Sumitomo Shoji America, Inc. ("Sumitomo" or "Petitioner"), defendant in the District Court below, is established under the laws of the State of New York, is a wholly-owned subsidiary of a Japanese commercial enterprise, and, as such, is "controlled" by such Japanese commercial enterprise as contemplated in Article VII(1)(c) of the Treaty.

Respondents, plaintiffs in the District Court below, claim with one exception to be citizens of the United States and past or present female secretarial employees of Sumitomo, and claim, *inter alia,* that Sumitomo's practice of hiring male, Japanese citizens for management-level positions discriminates against them on the basis of U.S. nationality in violation of Section 7(a) of Title VII. Petitioner's Pet. for Cert., App. A at 3a.

SUMMARY OF ARGUMENT

The FCN Treaties, including the Japanese Treaty, create rights on behalf of foreign corporations to exercise control over their United States branches and subsidiaries and to appoint and employ foreign citizens "of their choice" as managers in those United States branches and subsidiaries. Since these FCN Treaties, including the Japanese Treaty, create rights on behalf of foreign corporations to use their own *citizens* as managerial personnel, these FCN Treaties do not come into conflict with the provisions of Title VII or the judicial decisions promulgated thereunder, which statutory provisions and judicial decisions do not prohibit discrimination on the basis of citizenship. Moreover, the right of both foreign and Japanese corporations to use entirely their own citizens, if they so choose, as managerial personnel could not have been modified or abrogated by Title VII, since there is absolutely no Congressional intent, express or implied, or statutory mandate, to do so.

These conclusions are in every respect as true for the Japanese Treaty as they are for FCN Treaties as a whole. The language of Article VIII(1) of the Japanese Treaty expressly grants Japanese corporations a right to appoint to the executive positions in their United States branches and subsidiaries Japanese citizens of their choice, which right neither conflicts with nor has been expressly or impliedly amended or revoked by Title VII.

ARGUMENT AND AUTHORITIES

THE 1953 TREATY OF FRIENDSHIP, COMMERCE AND NAVIGATION BETWEEN THE UNITED STATES AND JAPAN CREATES A TREATY RIGHT TO STAFF MANAGERIAL PERSONNEL OF AMERICAN SUBSIDIARIES OF JAPANESE CORPORATIONS WITH JAPANESE CITIZENS OF THEIR CHOICE, WHICH RIGHT HAS NOT BEEN ABROGATED OR AMENDED.

A. Article VIII(1) of the Treaty Confers a Right on Japanese Corporations to Employ Japanese Citizens of their Choice as Managerial Personnel in the United States.

The 1953 Treaty of Friendship, Commerce and Navigation between the United States and Japan entered into force on October 30, 1953, 4 U.S.T. 2063, T.I.A.S. No. 2863, as a self-executing Treaty which became part of the domestic law of the United States without the necessity of further legislative action. *See, e.g., Asakura v. Seattle,* 265 U.S. 332, 341 (1924); *Bacardi Corp., Inc. v. Domenech,* 311 U.S. 150, 161 (1940).[2]

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2 That Petitioner and similarly situated United States subsidiaries of foreign corporations have standing to invoke the rights of the Treaty has already been favorably determined in the Second Circuit decision below, 638 F.2d at 555-558, and in *Spiess v. C. Itoh & Company (America), Inc.,* 643 F.2d, 353, 356-359, *reh. granted,* 654 F.2d 302 (5th Cir. 1981). We rely on the arguments set forth in those decisions in concluding that Petitioner's standing to invoke the rights granted by the Treaty cannot seriously be disputed.

The language of the Japanese Treaty expressly grants Japanese corporations the right to fill management-level positions in their United States branches and subsidiaries with Japanese nationals of their choice. Article VIII(1) of the Treaty provides in relevant part that:

> *Nationals and companies of either Party shall be permitted to engage, within the territories of the other Party,* accountants and other technical experts, *executive personnel,* attorneys, agents and other specialists *of their choice.*

4 U.S.T. at 2070 (emphasis added).

In addition to the express language in the Treaty itself, the Department of State has unambiguously interpreted Article VIII(1) of the Treaty to confer on Japanese companies and their branches and subsidiaries the right to use Japanese citizens as managerial personnel in the United States. This Court should give meaning to the Treaty consistent with these genuine shared expectations of the contracting parties. *See Maximov v. United States,* 299 F.2d 565, 568 (2d Cir. 1962), *aff'd,* 373 U.S. 49 (1963); *Day v. Trans World Airlines, Inc.,* 528 F.2d 31, 35 (2d Cir. 1975); *Compagnie Financiere de Suez et de L'Union Parisienne v. United States,* 492 F.2d 798, 810-811 (Ct. Cl. 1974).

One source of the State Department's interpretation of the Treaty is its interpretation of FCN Treaties given to Congress at the time several FCN Treaties were being negotiated. During hearings held on July 13, 1953 before the Senate Subcommittee on Commercial Treaties, Committee on Foreign Relations, reported as *Commercial Treaties,* Hearing before the Subcommittee of the Committee on Foreign Relations, U.S. Senate, 83d Cong., 1st Sess. (the "1953 Hearings"), the State Department presented a tabular comparison of several proposed FCN Treaties and compared, *inter alia,* the Japanese Treaty to the 1949 Treaty of Friendship, Commerce and Navigation between the United States and Uruguay. That tabular comparison contains the following entries:

APPROVED TREATIES	PROPOSED TREATIES
URUGUAY	JAPAN
Art. V(4): Right to engage technical and managerial personnel *regardless of nationality.* Such employees may perform limited duties in other country without necessarily having qualified to practice a profession therein.	Art. VIII(1): *Same.*

1953 Hearings, *supra* at 6-9 (emphasis added).

Another source of the State Department's interpretation of the Treaty is found in a letter dated October 17, 1978 to Abner W. Sibal, General Counsel of the Equal Employment Opportunity Commission, by the State Department Deputy Legal Advisor, Lee R. Marks, who stated that:

> Article VIII(1) of the [Japanese] FCN Treaty gives nationals and companies of each Party the right to employ, in the territory of the other, "accountants and other technical experts, executive personnel, attorneys, agents and other specialists of their choice." This provision was intended to ensure that U.S. companies operating in Japan could have U.S. personnel for critical positions, and vice versa. *The phrase "of their choice" should be interpreted to give effect to this intention, and we therefore believe that Article VIII(1) permits U.S. subsidiaries of Japanese companies to fill all of their "executive personnel" positions with Japanese nationals admitted to this country as treaty traders.*

Letter of Lee R. Marks, State Department Deputy Legal Advisor, to Abner W. Sibal, General Counsel, Equal Employment Opportunity Commission, dated October 17, 1978, *re-*

printed in 73 Am. J. Int'l L. 281 (1979) (Joint Appendix at 94a) (emphasis added).[3]

Thus, the above tabular comparison between the Uruguay Treaty and the then-proposed Japanese Treaty, as well as the Marks letter, demonstrates that both the original State Department interpretation and the United States Senate's understanding of the Treaty at the time of the Treaty's self-execution unambiguously embrace a right of Japanese corporations to fill management-level positions in their United States branches and subsidiaries with Japanese citizens of their choice.

Therefore, the express language of Article VIII(1) of the Treaty, the legislative understanding of the Treaty, and the original State Department interpretation of the Treaty all recognize that Japanese nationals and companies have a right under the Treaty to use Japanese citizens "of their choice" as managerial personnel in their United States branches and subsidiaries.

The right of a foreign corporation to control completely the operation of its United States branches and subsidiaries has been recognized in contexts other than that of the Japanese

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3 Two additional letters have been issued by individuals within the State Department subsequent to the letter by Deputy Legal Advisor Marks quoted herein; both subsequent letters purported to interpret the rights granted by FCN Treaties. However, the Second Circuit below refused to heed either letter, 638 F.2d at 558 n.5, and this Court should do the same. With respect to the first letter dated September 11, 1979, *reprinted in* 74 Am. J. Int'l L. at 158-59 (1980), from James R. Atwood, Deputy Legal Advisor, U.S. Department of State, to Lutz Alexander Prager, Esq., Assistant General Counsel, Equal Employment Opportunity Commission, the Second Circuit noted that the Atwood letter, although it disagreed with the Marks letter, did not carry any weight with the court since it never explained how the Marks letter was in error. *Id.* With respect to the second letter dated September 9, 1980 from the U.S. Department of State to the Government of Denmark, the Second Circuit dismissed that letter after it found evidence that the EEOC, which was *amicus* on the appeal in support of the plaintiffs below, had participated in the preparation of the letter. *Id.*

Treaty. For example, in a statement by Tyge Lehmann, Head of Division, Legal Department, Ministry of Foreign Affairs, Kingdom of Denmark (Appendix B hereto), the Danish Government has unambiguously declared that:

> Danish companies which control and manage enterprises established or acquired in the United States according to Article VIII(1) [of the Danish Treaty] are entitled to engage Danish nationals in positions such as specified in Article VII(4). American companies, of course, enjoy the equivalent right in Denmark. *This interpretation is not only expressly underlined by the use in Article VII(4) of the words ". . . employees of their choice, regardless of nationality . . .", but is likewise mandated if the right [provided in the Danish Treaty] to control and manage enterprises in the territories of the other Party is to be maintained.*

App. B at 1 (emphasis added). This statement is similar to a previous statement by the Danish Ministry in a letter dated October 17, 1979 to The East Asiatic Company, Ltd., Joint Appendix at 309a. In the October 17, 1979 letter, the Danish Ministry commented that:

> Art. VII, paragraph 4, under which national companies of either Party are permitted to engage, within the territories of the other Party, accountants and other technical experts, executive personnel, attorneys, agents and other specialized employees of their choice, regardless of nationality, *has the direct aim of ensuring these companies the right to engage own [sic] citizens, i.e. foreigners in the eyes of the other Party, to fill the said posts.*

Joint Appendix at 309a. These statements demonstrate that the right of a foreign corporation to exercise control over the selection of the executive personnel in its U.S. operations is recognized by Denmark as well as many other governments who are parties to FCN Treaties.

A conclusion that Article VIII(1) of the Japanese Treaty guarantees Japanese nationals and corporations the ability to control completely the citizenship of managerial personnel in their United States branches and subsidiaries furthers the express policy of the Treaty to promote international trade. As the Assistant Secretary of State for Economic Affairs, Samuel C. Waugh, testified before the Senate:

> The object of the Department of State in negotiating treaties of this type is to facilitate the protection of American citizens and their interests abroad.
>
> * * *
>
> Such treaties facilitate the protection of American interests because they contain definite commitments with regard to specific rights.

1953 Hearings, *supra* at 2. Further:

> Of special concern to investors [under the FCN Treaties] are such assurances as . . . the right of the owner to manage his own affairs and employ personnel of his choice. . . .

1953 Hearings, *supra* at 2.

It must be kept in mind that the policy of promoting international trade, in part through the use of the executive selection rights granted in Article VIII(1) of the Japanese Treaty by our own country's nationals and companies operating through branches or subsidiaries in Japan, was not ignored by the Department of State in negotiating the Treaty. As Assistant Secretary of State Waugh further testified before the Senate:

> The extension of reciprocal privileges to aliens in this country has not, as an object in itself entered into the planning or execution of the program of negotiating in these treaties, *but it is necessary in order to secure*

> *American rights abroad.* Mutuality is the only basis upon which it is possible to obtain the assurances required.

1953 Hearings, *supra* at 3 (emphasis added).

Further, a Senate Executive Report of hearings regarding FCN Treaties, entitled "General Nature of Commercial Treaties", states:

> It must be borne in mind in considering these conventions that they are based on the principal of mutuality in that when the United States gives a right or privilege to an alien to carry on activities in the United States, or assumes an obligation with respect to protecting the rights of aliens, the United States *in turn obtains similar rights and privileges for American citizens in the foreign country with which the Treaty is concluded. Conventions of this type are advantageous to the United States since so many Americans conduct business in foreign countries.*

S. Exec. Rep. No. 5, 82d Cong., 1st Sess., at 3 (1953) (emphasis added).

Since the Treaty grants Japanese corporations freedom to select Japanese citizens of their choice for executive positions in their United States branches and subsidiaries, any analysis of this case or of a Japanese corporation's rights under the Treaty in general pursuant to the *bona fide* occupational qualification ("bfoq") exception of Title VII, 42 U.S.C. § 2000e-2(e), is unwarranted. Although the Second Circuit below noted that the bfoq exception might appropriately be applied herein, 638 F.2d at 559, any decision that a Japanese corporation must justify its executive selection decisions under the bfoq exception to Title VII, whether such exception is narrowly or expansively drawn, effectively ignores the meaning and dismantles the effect of Article VIII(1) of the Treaty. Such a decision would strip a party protected by the Treaty of its rights under the Treaty and would place it in the same position as if the Treaty and Article VIII(1) thereto had never been

enacted. Consequently, to the extent that Petitioner's Treaty rights are enforced herein, any bfoq analysis is unnecessary.

In summary, the Treaty was negotiated by the United States and Japan more than a quarter of a century ago to provide a right to Japanese corporations to fill executive positions in their United States branches and subsidiaries with Japanese citizens of their choice, with reciprocal rights granted to U.S. nationals and corporations. The Treaty was developed for the purpose of facilitating international trade among the parties and was predicated on the right of nationals to establish and thoroughly control corporate enterprises in the host country through management personnel of their choice. Many other FCN Treaties have also been enacted, and the rights granted foreign corporations by all of these FCN Treaties have assisted in the development of a substantial volume of international trade involving the United States. Since the Japanese Treaty and other FCN Treaties provide the foundation for a significant portion of the foreign economic policy of the United States toward Japan and of Japan toward the United States, the rights granted by the Japanese Treaty should be given full effect. *See Bacardi Corp. v. Domenech,* 311 U.S. 150 (1940); *Factor v. Laubenheimer,* 290 U.S. 276 (1933); *Reed v. Wiser,* 555 F.2d 1079 (2d Cir.), *cert. denied,* 434 U.S. 922 (1977).

B. Since Article VIII(1) of the Treaty Provides Japanese Corporations the Right to Appoint Only Japanese Citizens of their Choice to Managerial Positions in their United States Branches and Subsidiaries, the Treaty Does Not Conflict with the Provisions of Title VII of the Civil Rights Act of 1964, As Amended.

It is clear from the Legislative Hearings conducted concurrent to the enactment of the Treaty and from the legislation implementing the Treaty and enabling the rights established therein to become available to the Parties, that Article VIII(1) of the Treaty grants, *inter alia,* a Japanese corporation only the right to use Japanese *citizens* "of its choice" in executive positions for its United States branches and subsidiaries. First,

Section 101(a)(15)(E)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(E)(i)—which effectuates the Treaty rights of nationals and companies of Japan to appoint executive personnel "of their choice" to positions in their enterprises in the United States—provides "Treaty Trader" status to Japanese *citizens* seeking to enter the United States for the purpose of carrying on international trade from within the United States. Hence, this legislation effectuating the Treaty circumscribes the scope of the rights granted by Article VIII(1) of the Treaty by granting a right to enter the United States under the Treaty solely on the basis of the entering employee's Japanese citizenship.

Second, in 1952, at Hearings before the Subcommittee on Commercial Treaties and Consular Conventions, Senate Committee on Foreign Relations, 82d Cong., 2d Sess. 6 (1952) (the "1952 Hearings"), the term "nationality", which is the operative term in Article VIII(1) of the Treaty, and the term "citizen" were used synonymously. *See, e.g.*, Letter from Jack Tate, Acting Legal Advisor of the Department of State, to Senator Sparkman, 1952 Hearings, *supra* at 40; *see also,* Note, *Commercial Treaties and the American Civil Rights Laws: The Case of Japanese Employers,* 31 Stan. L. Rev. 947, 952 (1979).

Accordingly, Article VIII(1) of the Treaty grants Japanese companies the right to select Japanese *citizens* "of their choice" for managerial positions in their United States subsidiaries and branches. Since the rights granted by Article VIII(1) of the Treaty to Japanese companies only involve the *unrestricted* selection of Japanese citizens to fit limited positions, such Treaty rights do not conflict with the express provisions of Title VII of the Civil Rights Act of 1964 or the judicial decisions promulgated thereunder.

The express language of Title VII does not prohibit employment decisions purely on the basis of alienage or citizenship. Section 7(a) of Title VII provides, in pertinent part, only that:

> It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any

> individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, *because of such individual's race, color, religion, sex, or national origin. . . .*

42 U.S.C. § 2000e-2(a)(1) (emphasis added). Thus, the operative language of Title VII herein does not expressly prohibit the selection of Japanese citizens, solely on the basis of their citizenship, by a Japanese corporation for managerial positions in such Japanese corporation's United States branches or subsidiaries.

Additionally, the conclusion that the clear statutory language of Title VII does not prohibit citizenship-conscious employment decisions, is supported by prior decisions of this Court. In this Court's decision in *Espinoza v. Farah Manufacturing Co., Inc.*, 414 U.S. 86 (1973), an employer's refusal to hire a person because of her foreign citizenship was held by this Court not to violate the provisions of Title VII of the Civil Rights Act. Instead, this Court held that, by the term "national origin", Congress had not intended to refer to distinctions based upon citizenship. *Id.* at 89-91. *See also, Ramirez v. Sloss*, 615 F.2d 163, 167 n. 5 (5th Cir. 1980) ("The 1964 Act [Title VII] does not apply to employment discrimination on the basis of alienage."); *cf. Nguyen v. Montgomery Ward & Co., Inc.*, 513 F. Supp. 1039 (N.D.Tex. 1981).

Finally, the primary policy considerations underlying Title VII are not implicated by the citizenship-conscious employment selection in this case. It must be kept in mind that Title VII is much more compellingly applied to cases of discrimination against insular and discrete minorities than in situations, as here, where a majority of United States citizens is attempting to invoke Title VII to prohibit the employment of members of a discrete minority of Japanese citizens. *See, e.g., Fullilove v. Klutznick*, 448 U.S. 448, 449 (1980); *McDonnell Douglas Corporation v. Green*, 411 U.S. 792, 800 (1973) ("The language of Title VII makes plain the purpose of Congress . . . to

eliminate those discriminatory practices and devices which have fostered . . . stratified job environments to the disadvantage of *minority* citizens") (emphasis added). Since Article VIII(1) of the Treaty furthers the legitimate policy of promoting international trade—without discriminating against any "minority" group—a decision herein upholding Article VIII(1) of the Treaty does not undermine Title VII's special solicitude for protecting discrete and insular minorities.

Accordingly, since Petitioner's right under Article VIII(1) of the Treaty to employ Japanese nationals in its United States operations is based solely upon such employees' Japanese citizenship, and since Title VII does not prohibit employment discrimination on the basis of citizenship, the selection of Japanese citizens to fill executive-level positions of United States branches and subsidiaries of Japanese corporations neither violates Title VII of the Civil Rights Act, nor even implicates the policy of Title VII to protect insular minorities against unjust discrimination. Therefore, the rights granted by Article VIII(1) of the Treaty should be upheld.

C. The Rights Conferred by Article VIII(1) of the Treaty to Manage and Control Branches and Subsidiaries of Japanese Corporations Have Not Been Amended or Revoked by Title VII of The Civil Rights Act, As Amended.

A holding herein that Title VII has neither amended nor rescinded rights established by Article VIII(1) of the Treaty is consistent with the language of and practice surrounding the Treaty, with the legislative history of Title VII, and with this Court's long-standing practice of enforcing to the greatest extent possible international treaties vis-a-vis subsequent domestic legislation.

1. The Rights Granted by Article VIII(1) of the Treaty Were Intended to Have Effect Regardless of Other Conflicting Domestic Legislation.

For several reasons, a Japanese corporation's right pursuant to the Treaty to fill executive-level positions in its United States

branches and subsidiaries with Japanese citizens of its choice is not circumscribed by federal or state laws which might otherwise affect the employment practices of a U.S. domestic corporation.

First, the language of the Treaty itself supports this conclusion. Article VIII(1) provides that the Japanese companies may select management-level personnel "of their choice". These words would be rendered virtually meaningless if they were interpreted to be impliedly qualified by a phrase such as "except as elsewhere provided."

Second, and more importantly, one State Department negotiator of the Treaty and of similar Treaties of Friendship, Commerce and Navigation has recognized expressly that the right granted by the Treaty to Japanese corporations to fill the management-level positions in their United States branches and subsidiaries with Japanese citizens is effective regardless of existing U.S. laws which otherwise regulate employment practices. Herman Walker, Jr., a member of the Department of State who negotiated the Treaty and many other FCN Treaties between the United States and other nations, has, in several articles without official attribution, commented in relation to this managerial-level employee selection right:

> Though equal provision for subordinate investor-enterprise employees is not yet possible owing to lack of statutory authority, such personnel is to an extent provided for, in that *management is assured freedom of choice* in the engaging of essential executive and technical employees in general, regardless of their nationality, *without legal interference* from "percentile" restrictions and the like. . . .

Walker, *Treaties for the Encouragement and Protection of Foreign Investment: Present United States Practice,* 5 Am. J. Comp. L. 229, 234 (1956) (emphasis added). Further, noting that the rights granted by certain FCN Treaty provisions were not "contingent" on whether domestic laws were favorable, Mr. Walker noted:

> There is also a certain margin for the play of non-contingent standards, or "absolute" rules, in the formulation of [these] treaty provisions.

Walker, *Modern Treaties of Friendship, Commerce and Navigation,* 42 Minn. L. Rev. 805, 811 (1958).

Hence, although a substantial portion of the Treaty grants Japanese corporations only those rights also available to domestic United States corporations ("national treatment"), *see, e.g.,* Walker, *Provisions on Companies in United States Commercial Treaties,* 50 Am. J. Int'l L. 373, 384 (1956), the affirmative grant to Japanese corporations of a right to use Japanese citizens as managerial and technical personnel in their United States branches and subsidiaries goes "beyond national treatment. . . ." Walker, *Provisions on Companies in United States Commercial Treaties, supra* at 386.

Third, the other provisions in Article VIII of the Treaty demonstrate that Article VIII of the Treaty unconditionally provides Japanese corporations the right of "free choice" in selecting Japanese citizens to serve as managerial-level personnel in their United States branches and subsidiaries. In addition to the language of Article VIII(1) quoted above that Japanese companies may "engage . . . executive personnel . . . of their choice," Article VIII(1) also permits certain Japanese professionals to engage in certain types of employment within the United States regardless of their compliance with United States statutes and regulations which regulate the employment of United States citizens who are professionals in the same occupations. Article VIII(1) of the Treaty further provides, in pertinent part that (emphasis added):

> Moreover, such nationals and companies shall be permitted to engage accountants and other technical experts *regardless of the extent to which they have qualified for the practice of a profession within the territories of such other Party,* for the particular purpose of making examinations, audits and technical investigations exclusively for, and rendering reports to, such nationals and compa-

> nies in connection with the planning and operation of their enterprises, and enterprises in which they have a financial interest, within such territories.

See also, Walker, *Provisions on Companies in United States Commercial Treaties, supra* at 386. This other Article VIII(1) right of a Japanese corporation to employ certain professionals in its United States operations regardless of U.S. laws regulating the qualifications of those professionals, demonstrates that all Article VIII(1) rights, including the right at issue here of selecting executive personnel, have been negotiated to be exempt from, and in fact are not subject to, the restrictions of laws which otherwise affect United States citizens and corporations.

In summary, the language of, the practice surrounding, and the clear import of the remaining portions of Article VIII(1) demonstrate that the rights granted by the Treaty to Japanese corporations to staff their United States branches and subsidiaries with Japanese executives is not contingent in any way upon the existence of other domestic United States legislation.

The above conclusion that the "of their choice" provision of Article VIII(1) the Treaty creates a limited but absolute rule that permits foreign nationals and corporations to control their overseas investments through the selection of a few executive-level personnel has already been expressly set forth by the Fifth Circuit in *Spiess v. C. Itoh & Co. (America), Inc.*, 643 F.2d 353 (5th Cir. 1981). In that decision, the Court stated:

> [c]onsidering the Treaty as a whole, the only reasonable interpretation is that ["of their choice"] means exactly what it says: Companies have a right to decide which executives and technicians will manage their investment in the host country, *without regard to host country laws.*

643 F.2d at 361 (emphasis added).

And:

> [i]t is apparent that *article VIII(1)*'s "of their choice" provision *was intended*, not to guarantee national treatment, but *to create an absolute rule permitting foreign nationals to control their overseas investments.*

643 F.2d at 360 (emphasis added).

Hence, the rights granted to Japanese corporations by Article VIII(1) of the Treaty are not contingent upon other domestic United States legislation.

It must be noted that the right granted by the Treaty to Japanese companies to fill managerial-level positions with Japanese citizens of their choice, despite the existence of U.S. laws regulating employment practices, does not depend upon whether such U.S. laws would be characterized as "ultranationalistic" or "progressive". First, the clear language of Article VIII of the Treaty does not distinguish between those two "types" of statutes but, instead, grants the executive-selection right unconditionally. Second, such a characterization of legislation is difficult at best and must necessarily presume an improper intent on the part of Congress if the statute is viewed other than as "progressive" or otherwise well-intended. Finally, any attempt to abrogate the Article VIII(1) Treaty rights on a selective basis as a result of necessarily loose characterizations of the conflicting domestic legislation subverts the purpose and legislative understanding of the Treaty, which is to promote international trade by allowing foreign investors complete control over their investments abroad. Accordingly, it is irrelevant whether the source of potential interference with the Treaty is viewed as "progressive" or "ultranationalistic" legislation—the Treaty rights should prevail.

2. *Title VII Has Neither Amended Nor Revoked the Rights Granted by Article VIII(1) of the Treaty.*

Although Congress was fully aware of the privilege created by Article VIII(1) of the Japanese Treaty and the other FCN Treaties at the time it enacted Title VII and its subsequent

amendments, the legislative history of Title VII and its amendments, as well as the statute itself are devoid of any intention to amend or supersede these long-standing Treaty rights.

First, Title VII should not be held to amend or revoke Article VIII(1) of the Treaty since Congress never expressed any intention to do so. This Court will not give effect to any attempt to revoke a treaty without a clear expression from Congress. As this Court has said elsewhere, "[i]f Congress intended a result so drastic, it is not unreasonable to expect that it would have said so expressly." *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 285 n. 13 (1974). *Itzcovitz v. Selective Service Local Board No. 6, New York*, 301 F. Supp. 168 (S.D.N.Y. 1969), *appeal dismissed*, 422 F.2d 828 (2d Cir. 1970); *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 (1963). Similarly, a fundamental principle of treaty interpretation is that:

> A treaty will not be deemed to have been abrogated or modified by a later statute unless such purpose on the part of Congress has been clearly expressed.

Cook v. United States, 288 U.S. 102, 120 (1933). As has been stated regarding the rule established in *Cook, supra*:

> This familiar rule [in *Cook*] should be strictly applied because relations with other countries are directly affected. *Courts should be more hesitant to find that statutes of Congress modify or abrogate treaty provisions* than to find that they repeal existing legislation *because Congress was not the principal draftsman or actor in making the treaty part of the "supreme law of the land."* Thus, [a] standard repealer clause . . . cannot be read to affect [a] treaty right unless the legislative history manifestly evidences such intention.

Itzcovitz, supra, at 181 (emphasis added); *see also, McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 (1963). Similarly, in *Asakura v. Seattle*, 265 U.S. 332 (1924), this Court stated:

> Treaties are to be construed in a broad and liberal spirit, and, when two constructions are possible, one restrictive of rights that may be claimed under it and the other favorable to them, the latter is to be preferred.

265 U.S. at 342. *See also, Bacardi Corp. v. Domenech,* 311 U.S. 150 (1940); *Factor v. Laubenheimer,* 290 U.S. 276 (1933); *United States v. A.L. Burbank & Co., Ltd.,* 525 F.2d 9 (2d Cir. 1975).

Title VII has not amended or revoked Article VIII(1) of the Treaty, since Congress neither debated nor even mentioned the Japanese Treaty and the other FCN Treaties in enacting Title VII. Pursuant to the long-standing principles of treaty interpretation set forth above, this utter silence is insufficient to bring about any change in the force of the Article VIII(1) Treaty rights. If Congress had intended in 1964 to modify or revoke the vast number of long-standing Treaty rights of nationals and corporations of Japan and of many other countries throughout the world to employ managerial personnel of their choice in the United States, such a fundamental departure from the rights of foreign nationals and corporations surely would have been the subject of intense debate during the legislative hearings and discussions on Title VII and its 1972 Amendments. However, neither does the language of Title VII, its amendments, or the legislative history thereof contain any reference to the many Treaty commitments of the United States, nor do they refer in any way to any intent to modify those Treaty commitments. *See generally,* U.S. Code Cong. & Admn. News, 88th Cong., 2d Sess. (1964) at 2355; U.S. Code Cong. & Admn. News, 92d Cong. 2d Sess. (1972) at 2137. Moreover, although Congress had further opportunity to modify, revoke, or even comment upon the FCN Treaty rights while it considered the 1972 Amendments to Title VII, its continued silence regarding the FCN Treaties is ample evidence of its unwillingness to abrogate in any way the rights created therein.

It cannot be imagined even for a moment that Congress in enacting Title VII would intend to revoke rights under numer-

ous FCN Treaties protecting uncounted thousands of foreign nationals and corporations, of which rights Congress was well aware, without as much as a single statement either in the legislative history of Title VII or in the statute itself. To believe that Congress would silently revoke such substantial and long-standing Treaty rights is sheer folly.

Second, the failure of Congress to revoke expressly or even mention the Treaty rights of foreign nationals and corporations is in stark contrast to the clear Congressional action taken upon the passage of the Foreign Boycotts Act, 91 Stat. 244. In that Act, Congress expressly provided that the United States Civil Rights Laws should be applied to foreign corporations, noting that:

> [n]othing in this subsection may be construed to supersede or limit the operation of the antitrust or civil rights laws of the United States.

50 U.S.C. app. § 2403-1a, Section 4A(a)(4), 91 Stat 244, 246 (1977). Thus, the Foreign Boycotts Act demonstrates that, when Congress intends to bring foreign corporations operating in the United States within the ambit of the laws of the United States, it does so in a clear, unambiguous manner.

Third, a long-continued practice under a treaty, known and acquiesced in by Congress, raises a presumption of Congressional consent to it. *Dames & Moore v. Regan*, 49 U.S.L.W. 4969, 4978 (July 2, 1981) (citing *United States v. Midwest Oil Co.*, 236 U.S. 459, 474 (1915)). Consequently, the failure of Congress expressly to revoke these Treaty rights demonstrates that it had no intention of superseding, modifying, or revoking, *inter alia*, the Article VIII(1) Treaty rights of Japanese corporations to use Japanese citizens as managerial personnel in their United States branches and subsidiaries.

Finally, this Court should apply to the instant action the reasoning of its decision in *Morton v. Mancari*, 417 U.S. 535 (1974), that the repeal of a Treaty by implication is not favored, in holding that the Treaty rights of Japanese corpora-

tions have not been amended or revoked by Title VII. In *Morton v. Mancari, supra,* this Court reviewed the relationship between Title VII and a previously enacted statute authorizing preferential treatment in the employment of Indians on or near Indian reservations. This Court held that the preferential employment reference in that statute, which was in contradiction to Title VII, had not in fact been repealed by the 1972 Amendments to Title VII. 417 U.S. at 545-547. In so holding, the Court noted that:

> This is a prototypical case where an adjudication of repeal by implication is not appropriate. The preference [in the Indian employment statute] is a long standing important component of the government's Indian program. The anti-discrimination provision, aimed at alleviating minority discrimination in employment, obviously is designed to deal with an entirely different and, indeed, opposite problem. Any perceived conflict is thus more apparent than real.

417 U.S. at 550; *see also, Watt v. Alaska,* 49 U.S.L.W. 4433 (Apr. 21, 1981); *United States v. Will,* 449 U.S. 200, 221 (1980); *T.V.A. v. Hill,* 437 U.S. 153, 189 (1978). In *Morton v. Mancari, supra,* the Court also stated that, while the Indian preference statute was a specific provision applying to a specific situation:

> [t]he 1972 [Civil Rights] Act, on the other hand, is of general application. Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment.

417 U.S. at 550-51. *See also, Rossi v. Brown,* 467 F. Supp. 960 (D.D.C. 1979), *rev'd,* 642 F.2d 553 (D.C. Cir. 1980), *cert. granted,* 50 U.S.L.W. 3244 (October 5, 1981) (District Court *held* that specific provisions of 5 U.S.C. (Supp. III) 7201 note, which allows certain specific forms of discrimination, "controls over the general provisions of Title VII"); *Radzanower v.*

Touche Ross & Co., 426 U.S. 148, 155 (1976); *Fourco Glass Co. v. Transmirra Products Corp.*, 353 U.S. 222, 228-229 (1957).

In summary, the Treaty creates for Petitioner Sumitomo the right to fill all of its managerial positions in the United States with Japanese citizens. This limited treaty privilege to appoint citizens of Sumitomo's choice does not conflict with either the express terms of Title VII or the judicial decisions promulgated thereunder, and the rights created by this Treaty have not been expressly amended or revoked by Title VII or other subsequent act of Congress.

Accordingly, this Court should protect the international network of rights established by the FCN Treaties by upholding the rights granted to Japanese corporations in Article VIII(1) of the Japanese Treaty to appoint Japanese citizens as executive-level personnel in their United States operations. Such a result herein in favor of Petitioner would be consistent with the language of the Treaty and Title VII, the original State Department and Congressional understanding of the Treaty, and the legislative history of Title VII, and such a result would also protect the substantial international trade network which has developed with the assistance of the FCN Treaties.

CONCLUSION

For the reasons stated above, this action should be remanded to the District Court below with instructions to dismiss the nationality discrimination action for failure to state a claim upon which relief can be granted.

Respectfully submitted,

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